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IN THE

Supreme Court of the United States

October Term, 1968

No. 219

UNITED STATES OF AMERICA, *ex rel.*
COSME ROSADO,

Petitioner,

against

WALTER J. FLOOD, WARDEN OF NASSAU COUNTY JAIL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Cosme Rosado, prays that a Writ of Certiorari issue to review "the original Order and the Order of the United States Court of Appeals for the Second Circuit, rendered the 17th day of May, 1968, denying Petitioner a rehearing of its Order affirming the decision and Order of the United States District Court for the Eastern District of New York, which had denied Petitioner a Writ of Habeas Corpus."

Opinions Below.

There were two opinions rendered in the United States Court of Appeals. The opinion of the Court, delivered by Judge Feinberg, speaking for himself and Judge Waterman, took as the ultimate basis of decision, the principle that petitioner, being a mere witness before a State Grand Jury and not an indicted defendant, could not raise objection to the activities of that Grand Jury in such circumstances as those presented on this application. The Second Circuit noted in passing that in view of this basis of decision it was not necessary for it to reach such questions as whether or not the wiretapping here in question satisfied the procedural requirements of the Fourth Amendment mandated in *Katz* v. *United States.*

The Court also declared that, had it been necessary for it to address itself to this constitutional question, "a further complication would be that Judge Mishler held that Rosado orally waived any Fourth Amendment claim, and an examination of the record indicates that the oral argument in the district court did center around the effect of Section 605 rather than the constitutional question." (See pages 963-964 of the opinion of Judge Feinberg).

The Court also cites *Schwartz* v. *Texas* and *Pugach* v. *Dollinger,* although it is clear that the narrow basis of its holding rendered academic all other issues adverted to in its opinion including that of the effect of Section 605 of the Federal Communications Act, the subject of the *Schwartz* and *Pugach* decisions. However, it may be noted that the *Pugach* case, which is later in time, relied upon the precedent in *Stefanelli* v. *Minard,* as well as on *Schwartz* v. *Texas.*

With respect to petitioner's claim that by testifying concerning a telephone conversation to which he was a party he would have been aiding and abetting the District Attorney to violate Section 605, the Court stated "By disclosing,

under the compulsions present here, the contents" of the conversations in question "Rosado will not be criminally liable."

The concurring opinion of Chief Judge Lumbard held that petitioner had not presented to the Court a claim that he was in custody in violation of the Constitution or laws of the United States and reaffirmed the holding of the majority opinion that a federal court should not interfere with the Grand Jury's power to compel the witness to testify in circumstances such as these.

It further stated:

> "Rosado argues that he would be committing the federal crime of aiding and abetting the disclosure of wiretap information if he were to answer the questions which were put to him. It is clear to me that a reluctant witness before a grand jury who testifies under the threat of punishment for contempt as to the contents of telephone conversations to which he was a party is not a willing participant in an alleged scheme to violate Section 605 so as to be an aider and abettor of the scheme."

The petitioner contends on Page 2 of the petition for certiorari that "All three judges, however, seemed to agree that the State Police authorities and the District Attorney had violated Federal Law and that petitioner had no redress whatsoever because of the decisions of this Court in *Schwartz* v. *Texas* and *Pugach* v. *Dollinger, supra.*"

This contention is not borne out by a reading of the opinion of Chief Judge Lumbard, since that opinion makes no mention of *Schwartz* v. *Texas* or *Pugach* v. *Dollinger* and does not even comment concerning their applicability to this case.

Questions Presented

1. Does the petitioner present a well-constructed record clearly raising a federal question of sufficient substance to invoke the adjudicatory power of this Court where:

(a) the adjudication of the County Court of Nassau County, and the imprisonment of petitioner based upon it, were or could have been based upon a non-federal ground, namely, the State rule of law that a mere witness who is not asserting his privilege against self-incrimination may not challenge the legality of Grand Jury proceedings, and thus the federal courts below could not have granted relief to petitioner;

(b) the federal courts below could not have granted relief to petitioner, nor can he initiate this Court's processes of review, since his claims are foreclosed by a prior decision of this Court holding that a mere witness before a Grand Jury may not challenge the validity of its inquiry;

(c) the federal courts below could not have granted relief and this Court's powers of review are not properly invoked, because petitioner seeks to employ the remedy of federal habeas corpus to obtain a remission of the remainder of his punishment for contempt for refusal to testify before a State Grand Jury, which refusal was not grounded upon the privilege against self-incrimination, and this Court has already established the controlling principle with respect to this subject by holding that habeas corpus relief is not available in such circumstances;

(d) the record does not clearly indicate that the petitioner had exhausted available State remedies at the time he sought federal habeas corpus relief in District Court, since petitioner had never attempted

to obtain State review of his contempt adjudication by an Article 78 proceeding, which is the only proper means of review under State law;

(e) the United States District Court held in its Order denying the Writ of Habeas Corpus that petitioner had orally waived any Fourth Amendment claim and the United States Court of Appeals stated, in this connection, in the Order here sought to be reviewed that "an examination of the record indicates that the oral argument in the district court did center around the effect of section 605 rather than the constitutional question", thus suggesting that there is a serious doubt whether the record presented on this petition is sufficiently well-constructed and unambiguous in its presentation of a substantial federal question to engage this Court's attention;

(f) the constitutional issue as to whether or not the wiretapping here involved, and the State Court wiretap Order on which it was based, complied with those procedural standards mandated in the reading of the Fourth Amendment set out in this Court's *Berger* and *Katz* decisions was not raised by the petitioner in the United States District Court or the United States Court of Appeals and *Berger* and *Katz* were cited in the original petition in the District Court and the petition for re-hearing in the United States Court of Appeals only to demonstrate that the underpinnings of this Court's *Schwartz, Pugach* and *Olmstead* decisions had been eroded by the *Berger* and *Katz* decisions and that such wiretapping constituted an invasion of the petitioner's Fourth Amendments rights;

(g) the portion of Section 605 here involved was repealed recently by Section 803 of the "Omnibus

Crime Control and Safe Street Acts of 1968" and therefore this provision of Section 605 lapsed and abated under the principle recognized in this Court's decisions, including *Hamm* v. *Rock Hill,* and questions concerning its meaning are thus not of sufficient importance to activate the majestic processes of this Court;

(h) this Court has already expressed its disapproval of federal judicial interference in State criminal proceedings in *Stefanelli* v. *Minard, Douglas* v. *City of Jeanette, Cleary* v. *Bolger, Wilson* v. *Schnettler* and *Pugach* v. *Dollinger,* such that the federal judicial intervention sought by petitioner is foreclosed by decisions of this Court and there is no open question in this regard requiring a pronouncement from this Court;

(i) the petitioner was imprisoned under a State adjudication of contempt when he refused, after a grant of immunity, to testify concerning the contents of certain telephone conversations of which he had obtained knowledge, not through an interception of those conversations within the meaning of Section 605, but rather by participating in them as a party, and his testimony, not being a divulgence of anything he learned through an interception, and being given under compulsion, would not constitute him a violator of the provision of Section 605 which prohibits one who has intercepted a telephonic communication from divulging its contents;

(j) there is only one day remaining to be served on petitioner's thirty day term of imprisonment for contempt.

Statement

For one and a half years a Nassau County Grand Jury investigating the operations of organized crime has sought to obtain important testimony from Cosme Rosado and for one and a half years Rosado has adamantly refused to testify concerning certain matters even though he was granted full and complete immunity from self-incrimination by the said Grand Jury.

Petitioner-appellant, in effect, seeks to use a federal habeas corpus proceeding as a means of reviewing a decision of Judge Paul Kelly of the County Court of Nassau County, New York, adjudging him in contempt in refusing to answer questions put to him after he was granted immunity before a Grand Jury of the County Court of Nassau County. Rosado was given a thirty jail term under the contempt provisions of the Judiciary Law of the State of New York (Section 750, *et seq.*), having served at least two thirty day terms previously under prior contempt adjudications of the County Court of Nassau County for similar refusals to testify. The Judge informed him at that time, however, that he could purge himself of contempt if he would testify with regard to the matters about which he had been questioned.

Judge Kelly's contempt order was rendered on December 1, 1967. However, Judge Kelly declared that the execution of the order should be stayed for one week until December 8th, for the purpose of allowing Rosado's attorney to make application for relief in the New York Court of Appeals. That Court denied relief. Rosado then obtained a temporary stay of execution of the contempt order from Justice Rabin of the Appellate Division of the New York State Supreme Court, Second Department, pending consideration of Rosado's application for a stay of execution in connection with the review of the contempt order by the Appellate Division. This application was thereafter

denied by the full Court Panel and the temporary stay was vacated.

Although, under Section 752 of the New York Judiciary Law and the case law, an Article 78 proceeding is the only available means of reviewing such a contempt order, the petitioner has never brought such a proceeding, preferring instead to seek relief by way of appeal. The statute of limitations concerning an Article 78 proceeding (C.P.L.R. 217) is four months, and when petitioner brought his application in United States District Court in January, 1968, four months had not yet elapsed from December 1st, 1967, the date of the contempt order. Thus at the time of his District Court petition, petitioner had not exhausted all state remedies then available to him.

On December 14th, Rosado appeared before Judge Paul Kelly in County Court, Nassau County, with his attorney, Irving Anolik, and advised the Court that he was going to testify and answer all questions posed to him by the Grand Jury. His attorney requested an adjournment of a few days so that his client could get his affairs in order. Rosado's appearance was adjourned until December 19th, the following Tuesday.

On December 19th, at approximately 10:30 A.M., the District Attorney's office received a telegram from Rosado's attorney, Irving Anolik, advising that one Dr. Cartaya had informed him that Rosado was in the hospital with a possible heart attack. The telegram did not give the name of the hospital.

On that same day, December 19th, Judge Paul Kelly, with the consent of Rosado's attorney, commissioned Dr. Michael Rost to examine Rosado in the hospital. On December 20th Dr. Rost examined Rosado in the hospital, and thereafter reported that Rosado was not suffering from a heart attack, but only from a stomach disorder,

and could be transported from the hospital to the prison ward of Meadowbrook Hospital without any danger to his health.

Judge Kelly then signed and issued a Warrant of Commitment, directing the Sheriff to transport Rosado from the hospital to the prison ward of Meadowbrook Hospital, and the Sheriff executed the Warrant of Commitment. At the time he issued the Commitment Warrant, Judge Kelly stated in open court that the sequence of events whereby Rosado first indicated a willingness to testify and then went into the hospital, clearly indicated to him that the offer to testify was not bona fide and was a delaying tactic similar to Rosado's entry into a hospital approximately a year and a half ago on the eve of his scheduled testimony before the Grand Jury. On the earlier occasioon, Rosado had also claimed to be suffering from a heart attack.

Thereafter, Rosado sought habeas corpus relief from the United States District Court for the Eastern District and, after it was denied, appealed the Order of denial to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the Order of the District Court, but granted bail and a stay of its commitment pending petition to this Court for certiorari. There is one day remaining to be served on petitioner's term of imprisonment for contempt.

ARGUMENT

Certiorari should not be granted because the court below did not commit error and the record does not clearly present a substantial federal question for this Court's consideration.

A. The County Court adjudication of contempt, the County Court's rejection of Rosado's claims, and Rosado's imprisonment are all supported by the same adequate, independent non-federal grounds and thus the Federal Courts below could not have granted relief to petitioner, nor can petitioner invoke this Court's attention. Even if this were not so, the Federal Courts below could not have granted relief and petitioner cannot move this Court to exercise its powers of review, since the petitioner's claims are foreclosed by a prior decision of this Court.

It is respectfully submitted that the legal issues sought to be raised by petitioner do not exhibit that character of novelty sufficient to justify the exercise of this Court's adjudicatory power as a constitutional Court and that an imaginative rehearsal of the conceivable doctrinal foundations on which a decision of those issues could be predicated suggest that such a decision would constitute a restatement of established principles rather than an exercise in legalistic innovation.

Under the regime of practice ordained in the Rules of this Court and in this Court's certiorari jurisprudence, a review on Writ of Certiorari is not a matter of right and will be granted only where there are special and important reasons for such review.

It is a relevant criterion respecting the availability of review whether the court below has decided a federal question of substance not determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

The claim pressed upon the Court's attention by petitioner is foreclosed by a relevant precedent of this tribunal,

as will be shown presently. Thus it cannot be said that the subject rests in such a condition of indeterminacy that the guardians of our organic law must assert their high powers of synthesis to resolve divirgences of existing doctrine or that an exposition of our fundamental law is required to remedy a deficiency in the corpus of constitutional principles or to clarify the extent of their reach.

A federal court will decline to review the action of a State Court when that action is based upon an adequate and independent and non-federal ground *or might have been so based* (*Durley* v. *Mayo*, 351 U.S. 277; *Johnson* v. *Risk*, 137 U.S. 300; *Stembridge* v. *Georgia*, 343 U.S. 541; *Black* v. *Cutter Labs*, 351 U.S. 292) even though a Federal question was also involved (*Murdock* v. *Memphis*, 20 Wall. 590, 636, 22 L.Ed. 429; *Fox Film Corp.* v. *Muller*, 296 U.S. 207).

This rule has been applied specifically in the context of the certiorari remedy in those cases in which this Court has also held that it will deny *certiorari* where the State action sought to be reviewed *may have been based* on an adequate non-federal ground (*Pennsylvania* v. *Budd Co.*, 349 U.S. 935; *Lane* v. *Volusia Kennel Club, Inc.*, 348 U.S. 865; *Public Service Commission* v. *Wisconsin Bell Telephone Co.*, 309 U.S. 657).

In various cases, this Court has declined review, even where it found no State court decisions recognizing the existence of the possible non-federal ground. The Court viewed the existence of the non-federal rule as sufficiently probable under general principles of law in the absence of ruling State authority to the contrary. (*Klinger* v. *Missouri*, 80 U.S. (13 Wall) 257; *Bachtel* v. *Wilson*, 204 U.S. 36; *Blount* v. *Walker*, 134 U.S. 607).

While a habeas corpus proceeding tests the legality of a detention and not a judgment, the same rule is applicable to such proceedings in all cases save those involving state procedural defaults, since a contrary approach

would permit the Federal Courts to give advisory opinions in violation of the Constitutional provision which restricts the judicial power to cases and controversies. (See *Fay* v. *Noia*, 372 U.S. 391 and *Henry* v. *Mississippi*, 379 U.S. 443).

The State grounds justifying the contempt judgment and the incarceration of Rosado are not rules of procedural default, but, instead, involve a claimed substantive right, i.e., the alleged right of a prospective Grand Jury witness to challenge the Jury's methods of operation.

Even if the adequate State ground principle were not applicable in this case, Rosado's claim should still not be enforced, because a decision of this Court (and the case law of lower federal courts as well as that of the State of New York), precludes its successful assertion, as will be seen from the ensuing discussion concerning this subject.

In New York, the unjustified refusal of a subpoenaed witness to answer questions before the Grand Jury followed by the repetition of such refusal in open court before the Judge is a criminal contempt committed in the presence of the Court and may be punished summarily (*People* v. *Hackley*, 24 N.Y. 74, 79, 80; *People ex rel. Cirillo* v. *Warden*, 11 N.Y. 2d, at page 53; *People* v. *Knapp*, 4 Misc. 2d 449, 457).

Petitioner argued, in effect, that he could not properly be punished for contempt for refusing to answer certain questions (concerning the content of telephone conversations in which he participated) before the Grand Jury and for repeating his refusal in open court, because the District Attorney learned of the witness' existence through wiretapping and would not have subpoenaed him otherwise and thus his testimony would aid and abet the District Attorney in violating Section 605 and its prohibition against interception and divulgence of telephonic communications.

It should be pointed out that petitioner, who is a mere prospective witness before a State Grand Jury and not a defendant or target, (indeed he has been granted immunity from prosecution in order to obtain his testimony) is seeking to exercise the rights of a criminal defendant. It has been held by the highest court of New York State that only a defendant in a criminal action may complain of the illegality of wiretap evidence (*Siegel* v. *People,* 16 N.Y. 2d 330). The fact that petitioner was adjudged in contempt does not give him the status of a criminal defendant. A proceeding in a criminal case to punish for criminal contempt is a civil proceeding (*People* v. *Forbes,* 143 N.Y. 219, 223; see also Section 515, New York Code of Criminal Procedure).

Rosado's wiretap argument was asserted even before the contempt proceeding on his motion in County Court to quash a subpoena directing his appearance before the Grand Jury and to discharge him from the status of material witness and, in a decision dated December 6, 1966, the late Judge Martin M. Kolbrener rejected it and denied Rosado's motion.

In the course of his decision, Judge Kolbrener held that a material witness "cannot halt a Grand Jury investigation to inquire into the origin of the Grand Jury's sources of information . . . to permit this Grand Jury so to be hamstrung is to destroy the effectiveness of the Grand Jury as a bulwark against crime and injustice."

In view of the fact that, under the law of New York, Rosado was not privileged to ignore the subpoena served on him or to decline to testify as a witness under its command, it follows that he was properly adjudged in contempt for his refusal to answer questions. Even if Rosado were a criminal defendant instead of a mere contemptuous witness, this would not give him standing to object to the wiretap in question, where these wiretaps were not used as evidence to procure an indictment charging him with

criminal contempt. (He has not been indicted for the contempt here in issue.) Moreover, even if he were indicted, if he could not properly object to the wiretap in order to avoid testifying as a witness, he certainly could not object to it after he wrongfully refused to testify and was prosecuted for it.

It has been held that a Grand Jury may act on information of any kind derived from any source. It may even act on rumor or suspicion (*Matter of Manning* v. *Valente,* 272 App. Div. 358, 362; *People ex rel. Travis* v. *Knott,* 204 App. Div. 379, 383; *People* v. *Wyatt,* 186 N.Y. 383).

It is one of the most fundamental conventions of criminal jurisprudence, that he who seeks a legal remedy must do so in the service of his own rights rather than a stranger's. This idea is variously referred to as the doctrine of "standing", the requirement that the applicant be an "aggrieved party" or a "party in interest", the jurisdictional axiom of "justiciable controversy". Certainly, movant would have no status to move the dismissal of any indictment which might later be voted against other persons. (*People* v. *Doe,* 47 Misc. 2d 957). A witness cannot set limits to a Grand Jury inquiry (*Manning* v. *Valente,* 272 App. Div. 358, aff'd. 297 N.Y. 68) or challenge the propriety of testimony (*People* v. *John Doe,* 247 App. Div. 324, 326 2d Dept., aff'd. 272 N.Y. 473; *People* v. *Doe,* 176 Misc. 943, 946; see also *Matter of Edge Ho Holding Corp.,* 259 N.Y. 374). Even where the witness is vindicating his own rights on a motion to quash a subpoena, he cannot raise questions as to the propriety of the inquiry or as to its probable results (*People* v. *Doe,* 176 Misc. 946), or the relevance or propriety of questions which may be put to him (*People* v. *Doe,* 247 App. Div. 327, aff'd, 272 N.Y. 473; *Matter of Edge Ho Holding Corp., supra; Koota* v. *Colombo,* 17 N.Y. 2d 147).

The Grand Jury has plenary power which cannot be curtailed by Court order (*People* v. *Stern*, 3 N.Y. 2d 658; *People* v. *Ryback*, 3 N.Y. 2d 467) since the Grand Jury gets its power from the New York State Constitution, not the Court in which it is empanelled (*People* v. *Ryback, supra*).

The Grand Jury is the sole judge of what witnesses it shall hear and the competency of witnesses subpoenaed before it (*People* v. *Gelin*, 19 Misc. 2d 1051, 1059; *Morgan* v. *Null*, 117 F. Supp. 11, 15; In re *Giancana*, 325 F. 2d, 921).

The Grand Jury can decide upon its own procedure free of Court interference (*Morgan* v. *Null, supra; People* v. *Glen*, 173 N.Y. 395, 401; *People* v. *Sweeney*, 213 N.Y. 37, 45; *People* v. *Blair*, 33 N.Y.S. 2d 183, 189; nor can the Court indicate to the Grand Jury what action it should take (*People* v. *Both*, 118 Misc. 414).

The Grand Jury can investigate fully without hindrance (*Application of Mullen*, 176 Misc. 442) and a witness cannot challenge the legality or propriety of its organization or constitution (*People* v. *Doe*, 2d Dept., 247 A.D. 324, aff'd 272 N.Y. 473; *Barbuto* v. *Silver*, 19 Misc. 2d 149; *Blair* v. *United States*, 250 U.S. 273, 282-283; *People* v. *Doe*, 176 Misc. 943).

In *People* v. *Doe*, 176 Misc. 943, the Court said at page 946:

> "Finally, in view of the authority of the Attorney-General and of the grand jury, *People* v. *Dorsey* (*supra*), the law stated in *People* v. *'John Doe'* (*Byk*) (247 App. Div. 324; aff'd., 272 N.Y. 473) is controlling. There the court held: 'The grand jury is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by *questions of propriety or forecasts of the probable result* of the investigation or by doubts whether any particular individual will be found properly subject to an accusation of crime.' (*Blair* v. *United States*, 250 U.S. 273, 282). A witness is not even entitled to chal-

lenge the authority of the court or of the grand jury, provided they have a de facto organization and existence. (*Blair* v. *United States, supra.*)

'The relevancy of testimony submitted to a grand jury is no concern of a witness before that body. (*United States* v. *McGovern,* 60 F. (2d) 880.)' (See also, *Matter of Edge Ho Holding Corp.,* 256 N.Y. 374, in which Chief Judge Cardozo, in discussing the powers of the commissioner of accounts of the city of New York, said, 'They will be rendered to a large extent abortive if his subpoenas are to be quashed in advance of any hearing at the instance of unwilling witnesses upon forecasts of the testimony and nicely balanced arguments as to its probable importance. Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic.')''

On pages 1963-1964 of its opinion in this case, the Second Circuit held:

"*Rosado is not,* nor apparently is he likely to be, *an indicted defendant; he is merely a witness before a grand jury.* It has traditionally been held that such a witness usually cannot impede collection of evidence by the grand jury even though the issues he seeks to raise could later be litigated—perhaps with success—by an indicted defendant; e.g., *Blair* v. *United States,* 250 U.S. 273 (1919) (constitutionality of statute whose violation grand jury is investigating); *United States* v. *Neff,* 212 F. 2d 297 (3d Cir. 1954) (improper venue). See *United States* v. *Masterson,* 383 F. 2d 610 (2d Cir. 1967). The rationale of this doctrine is that the scope of a grand jury inquiry 'is not to be limited narrowly,' *Blair* v. *United States,* 250 U.S. at 282, because it is 'an important investigative instrument.' *United States* v. *Cleary,* 265 F. 2d 459, 461 (2d Cir.), cert. denied, 360 U.S. 936 (1959); see *United States* v. *Winter,* 348 F. 2d 204 (2d Cir.), cert. denied, 382 U.S. 955 (1965). Rosado relies on *United States* v. *Tane,* 329 F. 2d 848 (2d Cir. 1964), in which this court affirmed the dismissal of an indictment because it was based on an unlawful wiretap. In that case,

the indictment rested almost exclusively on the testimony of a witness before the grand jury whose identity and willingness to testify were both the product of the wiretap. But in *Tane, it was the defendant, not the grand jury witness, who successfully moved to dismiss.* Whatever remedy might be available either to suppress evidence obtained through wiretaps, cf. *In re Fried,* 161 F. 2d 453 (2d Cir.), cert. denied, 331 U.S. 858, cert. granted, 331, 804, cert. dismissed, 332 U.S. 807 (1947); *United States* v. *Klapholz,* 230 F. 2d 494 (2d Cir.), cert. denied, 351 U.S. 924 (1956); *Grant* v. *United States,* 282 F. 2d 165 (2d Cir. 1960), or to challenge an indictment based on such evidence, we do not feel justified on these facts in preventing the grand jury from requiring witness Rosado to answer questions before it. *United States* v. *McClosky,* 273 F. Supp. 604 (S.D.N.Y. 1967)." (Emphasis supplied.)

The United States District Court for the Southern District has rejected the same type of claim put forward by Rosado. In the case of *United States* v. *McClosky,* decided on October 2, 1967, 273 F. Supp. 604, Judge Tyler held in part:

"Assuming relevance and no conflict with the privilege against self-incrimination, the form and content of a grand jury's questions is a matter of complete discretion with it. In re Grand Jury Investigation of Giancana, 325 F. 2d 921 (7th Cir. 1965).

"The recent Supreme Court decision of Berger v. New York, 388 U.S. 41 (1967), finding this state's eavesdrop statute unconstitutional does not affect this result. Though it can be argued that the decision casts heavy doubt on the constitutionality of New York's wiretap statute, the remedy prescribed by the Supreme Court was exclusionary in nature, i.e., it would enable a defendant to have an indictment based on eavesdrop evidence heard by the grand jury dismissed. People v. Grossman, 20 N.Y. 2d 346 (1967). It does not, however, permit him to

refuse to answer grand jury questions. This is true regardless of whether they are queries suggested by the prosecution on the basis of its knowledge gained from wiretap or eavesdrop recordings."

The foregoing citations of authority in State law and federal law, including the pronouncement of this Court, *Blair* v. *United States,* 250 U.S. 273, bar the assertion by a mere witness before a Grand Jury of the sort of claims sought to be asserted by petitioner.

Moreover, habeas corpus relief is not obtainable in circumstances such as these. This Court has held that a petitioner who refuses, without invoking the privilege against self-incrimination, to obey a subpoena *duces tecum* or to answer questions propounded to him in a Grand Jury investigation could not, after having been committed for contempt, secure release on habeas corpus (*Ex parte Blair,* 253 F. 800, aff'd 250 U.S. 273).

Thus, petitioner has not presented to the federal courts below or to this Court a substantial federal question. A federal court will decline to review a claim which is lacking in substance. The claim in issue may be found "plainly insubstantial" either because it is patently without merit, or because prior decisions of the United States Supreme Court foreclose the possibility of asserting the claim in question (*Ex parte Poresky,* 290 U.S. 30; *California Water Service Co.* v. *Redding,* 304 U.S. 252, 255; *Turner* v. *Memphis,* 369 U.S. 350; *Bailey* v. *Patterson,* 369 U.S. 31, 33).

Thus, even if there were no adequate, independent non-federal ground to justify the contempt judgment of the County Court and the imprisonment of petitioner and to justify the United States District Court and Second Circuit in denying relief, the claim of petitioner as to the impropriety of the State Grand Jury proceeding still would not be a substantial federal question, since the Supreme Court

has already ruled on this subject in its decision in the *Blair* case, in which it indicated that a mere witness before a Grand Jury cannot challenge the legality of a Grand Jury's activities, and can not obtain habeas corpus relief in these circumstances. In view of this Supreme Court decision, the issue involved is not substantial and the District Court and Second Circuit could not properly have granted relief. (See *Port of Authority Bndhldrs. Protec. Comm.* v. *Port of New York Authority*, 387 F. 2d 259, 262, 2nd Cir., 1967.)

The foreclosive effect of such a Supreme Court decision is applicable even where subject matter jursdiction is present. The lower federal court, on ground of *stare decisis*, should accept the Supreme Court's previous decision as a conclusive characterization of the insubstantiality of the claim sought to be asserted (*Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 953 E.D. Pa. 1959, rev'd on oth, gr., 366 U.S. 582).

Indeed, this Court has held that it cannot review a claim foreclosed by its previous decisions or patently without merit (*Swope* v. *Leffingwell*, 105 U.S. 3; *Foster* v. *Kansas*, 112 U.S. 201; *Palmer* v. *Hussey*, 119 U.S. 96; *Hannis Distilling Co.* v. *Baltimore*, 216 U.S. 285; *Zucht* v. *King*, 260 U.S. 174; *Bailey* v. *Patterson*, 369 U.S. 31, 33; *Turner* v. *Memphis*, 369 U.S. 350). And this principle also applies where the claimant seeks review of the judgment of a lower federal court (*Newbury Port Water Co.* v. *Newbury Port*, 193 U.S. 561, 579; *Bell* v. *Hood*, 327 U.S. 678, 683; *Hart* v. *B.F. Keith Vaud. Exch.*, 262 U.S. 271, 274).

B. This Court has already expressed its disapproval of federal judicial interference in State criminal proceedings such that there is no open question in this regard requiring a pronouncement from this Court and the granting of habeas corpus relief in these circumstances would amount to a serious invasion of the prerogatives of the State judiciary and an exercise by the federal courts of appellate power with regard to the minute details of the day to day unfolding of those preliminary stages of State criminal procedure prior to the institution of a charge or the ascertainment of a defendant.

In seeking federal habeas corpus relief, petitioner, in effect, asks that the federal courts arrogate to themselves the power to control the flow of testimony and to determine the competency of witnesses in State Grand Jury proceedings. The exercise by the federal courts of such detailed supervision over the conduct of State judicial proceedings is utterly inconsistent with this Court's holding in *Steffanelli* v. *Minard* (342 U.S. 117) that the federal judiciary should refrain from such intrusions on State judicial prerogatives as will disrupt the delicate balance of responsibility and authority between these two coordinate judicial systems.

This principle has been reaffirmed by this Court on so many occasions that its authority would seem no longer open to question (See: *Douglas* v. *City of Jeannette,* 319 U.S. 157; *Wilson* v. *Schnettler,* 365 U.S. 381; *Cleary* v. Bolger, 371 U.S. 392). Thus, again, the relief sought herein is foreclosed by prior decisions of this Court and therefore the petition does not present a substantial federal question eligible for review.

If federal habeas corpus relief is granted here, such a grant will have the same effect as an injunction since, in effect, it will prevent the states from compelling parties to wiretapped telephone conversations to testify about them. In the future, such parties, knowing that if they refuse to testify, they may obtain relief in a federal habeas corpus proceeding from incarceration under a criminal contempt judgment, will simply refuse to give evidence regarding such conversations before Grand Juries and in criminal trials.

The result will be that the prosecution may not exploit the fruits of or leads from such wiretaps even in situations where the defendant would have no standing to object to these taps. The proof will thus be barred from evidence as effectively as if it were banned by injunction. Also, the testimoney of a party to a telephone conversation may be necessary to identify the voice of the other party and thus to make a wiretap admissible.

What petitioner sought to do in this habeas corpus application was to have a federal court decide when a mere witness must testify in a State Grand Jury proceeding and under what circumstances he may be punished for his refusal to do so. Never in the history of Federal—State judicial relations have the federal courts seen fit to exercise such overweening authority, and it is respectfully submitted that such a regime of minute federal supervision of the day to day details of State Grand Jury and judicial proceedings is not within the proper scope of the federal habeas corpus remedy. Such a role would impose enormous burdens on the federal courts, since it would make them, in effect, state appellate courts exercising supervisory oversight over those stages of criminal procedure which occur before an indictment is found and a defendant ascertained.

Under the regime of practice implied by Rosado's entreaty for relief, every State Grand Jury witness will be entitled to apply to the federal courts for redress, as will criminal defendants before they are even tried and convicted, since some semblance of a federal claim can always be conceived by counsel.

Even where such applications are ultimately dismissed as groundless, the necessity of processing and judging them preliminarily will still impose substantial additional burdens on an already over-burdened federal judiciary and on State prosecution staffs required to oppose such applications in federal courts.

C. The relief sought by petitioner could not be granted, since he has failed to exhaust a State remedy which was available when he sought a writ of habeas corpus in District Court.

A federal habeas corpus proceeding may not be maintained where the petitioner has not first exhausted State remedies available to him when habeas corpus is sought. Petitioner had not availed himself of a State remedy open to him, *i.e.*, the review of the judgment of the County Court adjudging him in contempt by an Article 78 proceeding in the Supreme Court of the State of New York. This method of review is established in that portion of the Judiciary Law of the State of New York on which the judgment of contempt was based, Section 750 *et seq.*, and specifically in Section 752. Moreover, the jurisprudence of the highest court of the State has mandated the suggested procedure as the only available methodology of review (*People* v. *Forbes,* 143 N.Y. 219, 223; *Douglas* v. *Adel,* 269 N.Y. 144) as has the controlling department of the Appellate Division, the Second Department, in *People* v. *Jerry Longo,* and *People* v. *Carlo A. Piccioli,* N.Y.L.J. 7/11/68, page 12, col. 2; *People* v. *Epps,* 21 A.D. 2d 650).

The refusal of Judge Breitel to grant leave to appeal to the New York Court of Appeals and a stay, which is referred to in the Statement in the petition, was simply based upon the fact that Rosado was then seeking to *appeal* from *the denial* of an application for a *writ of* prohibition which, in effect, was based upon the assumption that the Grand Jury and Judge Kelly had *uo jurisdition* to compel Rosado's testimony. In view of the obvious incorrectness of this assumption, Judge Breitel refused relief in the circumstances there present. He expressly declared that this was no indication of what position he might take if an Article 78 proceeding to review a contempt adjudication reached him.

D. Petitioner's testimony before the Grand Jury would not have violated Section 605, and, in any event, the repeal of that portion of Section 605 here involved abated its operative effect.

With respect to appellant's claim that divulgence of wiretaps is violative of Section 605 of the Federal Communications Act, it had been authoritatively declared by this Court that Section 605 does not require that wiretap evidence be excluded from state criminal proceedings even if disclosure of such evidence would violate Section 605 (*Schwartz* v. *Texas*, 344 U.S. 199; see also *Pugach* v. *Dollinger*, 277 F. 2d 739, aff'd. 365 U.S. 458).

It is true that this Court recently overruled the *Schwartz* case in *Lee* v. *Florida*. However, the question as to the extent to which *Lee* will be applied retroactively is still open and, presumably, will be dealt with by this Court in wiretap cases presently pending before it.

Moreover, the portion of Section 605 here involved was repealed by Congress recently (see S. Rep. No. 1097, 90th Cong., 2d. Sess. 107-108, 1968) in Section 803 of the "Omnibus Crime Control and Safe Streets Act of 1968" (H.R. 5037, Section 803) and thus lapsed and abated under the principle recognized by this Court's decision in *Hamm* v. *Rock Hill* (379 U.S. 306). It follows that petitioner can not invoke Section 605 as ground for a claim that the wiretaps of Rosado's telephone conversations were violative of federal law.

Furthermore, since the abated statutory provision in question has been deprived of both prospective and retrospective effect, questions concerning its meaning and regulatory effect are not of sufficient substance to activate the corrective machinery of this Court.

But, even if this portion of Section 605 were still in force, it would not be susceptible to the use which petitioner seeks to make of it.

Petitioner appears to argue that the compulsion before a State Grand Jury of this testimony as to his telephone conversations would amount to a violation of Section 605 since, by this expedient, the prosecution would be circumventing 605 and would be proving by indirection a telephone conversation which, under 605, it could not divulge by introduction of evidence of it obtained from an interception. In response to this argument, it may be observed that 605, by its language, appears to prohibit only that divulgence which is effected by the person conducting the interception. It would also seem clear that 605, in prohibiting divulgence, was referring to the publication of information which the petitioner had obtained by an interception. It seems to contemplate only the revelation of what one has learned by an interception. It is not broad enough in its phraseology to interdict and make criminally punishable the compulsion of testimony by a party to a conversation as to what he said and heard during that conversation. Counsel for petitioner argues that 605 must be given this interpretation in order to prevent the circumvention of the public policy underlying it. However, this is hardly justification for the interpretation of a statute ordaining criminal punishment (as 605 did when read in connection with *Section 501*) beyond the clear provisions of its language. It is well established that a penal statute must be strictly construed and that it may not be enforced so as to impose criminal penalties where these are not clearly mandated by its language. (*Hornstein* v. *Paramount Pictures,* 292 N.Y. 468, 470; *People* v. *Shakun,* 251 N.Y. 107; *People* v. *Nelson,* 153 N.Y. 90). The cited cases affirm the general rule accepted in virtually every jurisdiction in this country and in the void for vagueness jurisprudence of this Court.

If the draftsmanship of Section 605 was inadequate to achieve the public policy which prompted its enactment that was a matter for the Congress to remedy. Under the

Constitutional doctrine of separation of powers, the judiciary is barred from giving relief in such circumstances, since it has not been confided with legislative powers or the authority to individualize the application of statutory terms by amending them to suit the needs of particular cases.

It should also be pointed out that the wiretap interception in question was not conducted by the Grand Jury; it follows that that body cannot be subject to criminal prosecution for compelling Rosado to testify about a telephone conversation which was intercepted by some other authority; nor can that other authority be chargeable with criminal wrongdoing because the Grand Jury has exercised such compulsion. In any event, Rosado would not be criminally punishable even if his testimony were a divulgence, because it would be rendered under compulsion and would not be a wilful performance, as the Second Circuit has rightly held. Thus he cannot justify his refusal to testify on the ground that he was seeking to avoid penal liability or to refrain from aiding and abetting a criminal offense. Nor can Rosado excuse his refusal to testify on the theory that he was seeking to prevent the District Attorney and Grand Jury from violating the law. As was shown earlier in this Brief, a prospective witness before a Grand Jury cannot question the validity of its mode of organization or its procedures of operation or question its decisions as to the competency of witnesses or the admissibility of testimony.

Even assuming, *arguendo,* and contrary to fact, that if Rosado had testified under compulsion, this would have constituted a violation of Section 605 by *someone,* the fact is that he did NOT so testify and thus this alleged violation of 605 never occurred. Therefore, it cannot be said that the judgment of contempt, and Rosado's incarceration pursuant to it, are based on a violation of a federal statute. This situation is to be contrasted with that typical situation, in which federal habeas corpus relief is usually granted,

i.e., where the defendant imprisoned under a criminal conviction shows that there was an actual violation of some federal law or constitutional provision (*e.g.*, the admission into evidence of material unlawfully seized in violation of Fourth Amendment standards).

Moreover, as Judge Mishler held in District Court in his decision dismissing the petition herein, Section 605 expressly permits disclosure of the contents of a telephone conversation where, as here, such disclosure is demanded by a lawful authority such as a Grand Jury. Petitioner argues that such disclosure is not authorized by 605 where it is a divulgence of an interception; but even if this exegesis were correct, which is not conceded, it is simply irrelevant because *Rosado, in testifying, would not be divulging what he had learned by interception.*

From the foregoing analysis it may be seen that petitioner's imprisonment did not violate federal law.

E. The petitioner has not clearly demonstrated that he has effectively raised and preserved federal questions for this Court's consideration.

The United States District Court held in its Order denying the Writ of Habeas Corpus that petitioner had orally waived any Fourth Amendment claim and the United States Court of Appeals stated, in this connection, in the opinion supporting the Order here sought to be reviewed, that "an examination of the record indicates that the oral argument in the district court did center around the effect of section 605 rather than the constitutional question", thus suggesting that there is a serious doubt whether the record presented on this petition is sufficiently well-constructed and unambiguous in its presentation of a substantial federal question to engage this Court's attention.

The constitutional issue as to whether or not the wiretapping here involved, and the State Court wiretap Order on which it was based, complied with those procedural

standards mandated in the reading of the Fourth Amendment set out in this Court's *Berger* and *Katz* decisions was not raised by the petitioner in the United States District Court or the United States Court of Appeals and *Berger* and *Katz* were cited in the original petition in the District Court and the petition for re-hearing in the United States Court of Appeals only to demonstrate that the underpinnings of this Court's *Schwartz, Pugach* and *Olmstead* decisions had been eroded by the *Berger* and *Katz* decisions and that such wiretapping constituted an invasion of the petitioner's Fourth Amendment rights.

F. Petitioner does not present a substantial claim worthy of this Court's intervention, since his petition seeks, in effect, the remission of the one day remaining to be served under his term of imprisonment for contempt.

Petitioner's term of imprisonment was scheduled to expire on January 17, 1968, and he was released on January 16 on bail fixed by the Second Circuit. Thus petitioner has only one day more to serve on his 30 day term of imprisonment and such a claim for relief is not of sufficient importance to justify the heavy burdens of time and judgment which would be imposed upon this Court as inevitable incidents of plenary review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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